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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-353

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED WITH NOS. 75-354 AND 75-355

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States District Court for the Southern District of New York dismissing the complaint after trial is reported at 337 F. Supp. 1128 and is set forth in the separate appendix at A-125 through A-162. The opinions of a panel of the United States Court of Appeals for the Second Circuit reversing the District Court and finding liability is reported at 480 F.2d 341 and is set forth at A-1 through A-124. The decision of the District Court after the trial on remand and assessing damages is reported at 384 F. Supp. 507 and is set forth at B-43 through B-80. The opinion of the Court of Appeals reversing the District

Court and increasing the amount of damages is reported at 516 F.2d 172 and is set forth at B-1 through B-42.

Jurisdiction

On April 11, 1975 a panel of the Court of Appeals entered its decision reversing the District Court's assessment of damages. A timely petition for rehearing and rehearing en banc was denied on June 9, 1975 (E-5, E-7). A petition for a writ of certiorari was filed on September 5, 1975, granted on April 5, 1976 and consolidated with two other cases, *First Boston Corporation* v. *Chris-Craft Industries, Inc.*, No. 75-354 and *Bangor Punta Corporation, et al.* v. *Chris-Craft Industries, Inc.*, No. 75-355. The Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Statutes Involved

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), provided at all relevant times:

> "(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation."*

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* By P.L. 91-567 adopted December 22, 1970, after the events complained of in this action, Congress added the following sentence:

> "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), provides in pertinent part as follows:

> "(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of."

Questions Presented

1. Whether under Section 14(e) of the Securities Exchange Act of 1934 a tender offeror not seeking control on its tender offer is entitled to recover damages from three members of management of the target corporation for communications during the tender offer containing alleged misrepresentations in violation of Section 14(e), in the absence of proof that the alleged violations caused the tender offeror's subsequent injury—the loss of the opportunity to win a contest for control with another contestant which acquired control seven months later?

2. Whether three members of management of a target corporation may be held personally liable, jointly and severally, with other corporations when, seven months after the tender offer closed, another corporation, through transactions in which management of the target corporation did not participate and of which they had no knowledge, achieved control of the target corporation?

3. Whether under Section 28(a) of the Securities Exchange Act of 1934 an offeror is entitled to recover $36 million in damages on a $44 million investment without proof of the actual damages suffered on account of the acts

of management complained of calculated upon a hypothetical sale one year after management's alleged violations and four months after another corporation acquired control of the target corporation?

Statement of the Case

Petitioners are Howard Piper, Thomas F. Piper and William T. Piper, Jr. ("the Piper individuals") who were shareholders, officers and three of the eight members of the Board of Directors of Piper Aircraft Corporation in January 1969. Respondent is Chris-Craft Industries, Inc. ("Chris-Craft"), which in January 1969 made a cash tender offer for up to 300,000 shares of Piper Aircraft common stock. Despite the opposition of the Board of Directors of Piper Aircraft, Chris-Craft acquired more than 300,000 shares on its tender offer. In May 1969, three months later, Bangor Punta Corporation ("Bangor Punta") began purchasing Piper Aircraft shares for cash and through an exchange offer. By September 1969 it had acquired over 800,000 shares, enough to give it slightly more than 50% of the outstanding shares. Chris-Craft, by September 1969, had acquired just under 700,000 shares, or about 42% of the outstanding shares.

The decisions under review are two decisions of the United States Court of Appeals for the Second Circuit. In the first decision in March 1973 the panel reversed the judgment of the United States District Court for the Southern District of New York, which in December 1971 had dismissed Chris-Craft's complaint after trial, and remanded the case to the District Court with express directions to award damages and injunctive relief to Chris-Craft. On remand the District Court entered judgment against all defendants for $1,673,988 plus $599,010.89 prejudgment interest and an injunction against Bangor Punta. On appeal the Court of Appeals affirmed the injunction,

but reversed the District Court's damage determination and directed entry of judgment of $25,793,365 against all defendants plus more than $10 million in prejudgment interest.*

a. Factual Background

Beginning in late December 1968 Chris-Craft's President and Chief Executive Officer began purchasing shares of Piper Aircraft common stock on the New York Stock Exchange through a confidential numbered account with a broker (A-9, n. 2). By January 22, 1969 Chris-Craft had purchased about 100,000 shares at a total cost of over $5 million. On January 22 when Piper Aircraft stock was selling on the New York Stock Exchange at $52.50 per share, Chris-Craft purchased an additional 101,100 shares from a mutual fund, paying $65 per share (A-10). The next day Chris-Craft announced a cash tender offer for up to 300,000 additional shares of Piper Aircraft stock at $65 a share beginning immediately and ending 11 days later on February 3 (*ibid.*). Piper Aircraft's annual meeting was set for February 4 (R.1525A).**

Since Piper Aircraft had 1,644,790 shares outstanding, Chris-Craft would have required an additional 620,000 shares in order to acquire majority control. It limited its tender offer, however, to only 300,000 shares but reserved the right to take some or all of any additional shares ten-

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* After the Court of Appeals' first reversal of the District Court on liability issues in 1973, petitioners sought a writ of certiorari from this Court, which was denied in October 1973 (414 U.S. 910). The denial of such a writ does not foreclose this Court from considering those issues of liability on the present writ. See, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365-6, n. 1, rehearing denied, 410 U.S. 975 (1973).

** References to the record, consisting of the appendix on appeal in the Court of Appeals, are prefaced by the designation "R." References to the volumes containing the exhibits on appeal are prefaced by the designation "R.Ev."

dered. The tender offer required shareholders to tender an irrevocable proxy with their shares (Def. Ex. E; R.Ev. 708; R.1328A). This was necessary since Piper Aircraft's annual meeting to elect directors was set for February 4 with the record date one month earlier, and Chris-Craft was unwilling to wait an additional year before getting representation on Piper Aircraft's Board (R.1525A). Chris-Craft, therefore, sought to obtain proxies not only from the shareholders who tendered on its offer but also from the shareholders whose shares Chris-Craft had purchased during the month of January (R.248A).

Upon hearing of Chris-Craft's tender offer, management of Piper Aircraft immediately sought outside professional assistance in order to learn more about Chris-Craft. Accordingly, they contacted Piper Aircraft's investment bankers, The First Boston Corporation ("First Boston"), Piper Aircraft's counsel, Chadbourne, Parke, Whiteside & Wolff, and its auditors, Arthur Young and Company. Piper Aircraft's counsel in turn contacted D. F. King and Co., a proxy solicitation firm (R.228A; R.2049A). In addition, a meeting was arranged between members of Piper Aircraft management and Chris-Craft's management which proved completely unsatisfactory (R.2050A).

Information concerning Chris-Craft was rapidly accumulated. Piper Aircraft's management, after studying the material, decided that Chris-Craft's investment in Piper Aircraft would not be in the interests of Piper Aircraft shareholders. One factor in that decision was Chris-Craft management's "track record" (R.2051A-2052A). The prior corporate history of the Chris-Craft management did not inspire confidence in its ability to operate a manufacturing enterprise (R.1544A-1548A). Indeed, in a period of more than 10 years, the only company in whose securities Chris-Craft's management had invested and remained were those of Chris-Craft itself (R.1591A). Moreover, since the offer was limited to only 300,000 shares, the other shareholders would be left "hanging in limbo" (R.2053A).

On January 25 Piper Aircraft's eight-man Board of Directors met, unanimously decided to oppose Chris-Craft's tender offer and authorized management to communicate their opposition to Piper Aircraft shareholders. By letters dated January 27 and 28, over the signature of William T. Piper, Jr., President of Piper Aircraft at the time and one of the petitioners herein, shareholders were advised not to accept Chris-Craft's tender offer, with the reasons for that recommendation set forth (R.242A; R.246A).

Piper Aircraft management believed that affiliation with Grumman Aircraft Engineering Corporation ("Grumman"), with which it was familiar, would be a better alternative for Piper Aircraft shareholders than Chris-Craft (R.2056A-2058A). They, therefore, entered into negotiations, participated in by investment bankers for Grumman, Dillon Reed, and First Boston for Piper Aircraft (R.258A), and agreed to sell Grumman 300,000 authorized but unissued shares of stock at $65 per share (R.260A). Since the agreement constituted a material event, immediately after the agreement was signed, Piper Aircraft on January 29 issued a press release announcing it (R.266A-267A). On the same day the text of the press release was mailed to shareholders with the admonition: "Since the February 4th annual meeting is only a few days away, we urge you to sign, date and mail the enclosed proxy now" (R.268A).

After the announcement of the Grumman transaction the market price of Piper Aircraft shares declined from $64¼ on January 28 to $59⅝ on February 3, the date Chris-Craft's tender offer closed (A-114, n. 3). This made Chris-Craft's tender offer more attractive. As a consequence, Chris-Craft became concerned since it did not have sufficient cash to purchase substantially more than 300,000 shares. Chris-Craft, therefore, hastily began searching for funds to purchase excess shares tendered and learned that the cost of borrowing such funds would have been 43.11%

(A-114). It never borrowed those funds and instead closed its tender offer on February 3, as it had planned.

Chris-Craft received 304,606 shares of Piper Aircraft stock on its tender offer. It purchased them all, giving it a total of 547,106 shares, or about 33% of the shares outstanding. It publicly announced that the tender offer was concluded successfully (R.282A), and proceeded to vote the proxies it had obtained at Piper Aircraft's annual meeting the next day. Since Piper Aircraft has cumulative voting, Chris-Craft elected two representatives to Piper Aircraft's eight-man Board of Directors. Chris-Craft also began preparation of a registration statement for an exchange offer to Piper Aircraft's shareholders (R.290A; R.291A; R.292A).

The events just described constituted the sole actions by Piper Aircraft for which the Piper individuals were ultimately held liable to Chris-Craft for over $36 million in damages. Although Chris-Craft vehemently criticizes Piper Aircraft's management for subsequent events, the simple fact is that none of them caused Chris-Craft harm and no court has ever held otherwise.

b. The Subsequent Events

In March 1969 the agreement with Grumman was terminated and Piper Aircraft resumed its search for a better alternative than Chris-Craft.* Bangor Punta, which was among the companies contacted earlier, was unwilling to enter into an agreement with Piper Aircraft unless it was assured it could purchase the 501,090 shares of Piper Aircraft common stock owned by the Piper family, defined

* Piper Aircraft's agreements to purchase SouthPly, Inc. and United States Concrete Pipe Company of Florida were made on March 22 after First Boston had given Piper Aircraft written opinions that the terms of the proposed purchases were fair and equitable to the Piper Aircraft shareholders (R.295A). The purchases were rescinded on April 14 (R.307A). Chris-Craft did not claim that they had any effect on its efforts to acquire Piper Aircraft shares.

by the parties to mean William T. Piper, Sr., the founder of Piper Aircraft, and the 43 trusts, corporations and individuals related to him (R.212A; Pl. Ex. 52; R.Ev. 146, 172, Trial Tr. 884).

On May 8, 1969 Bangor Punta and the Piper family agreed that Bangor Punta would acquire the 501,090 shares and make an exchange offer to all other Piper Aircraft shareholders. On May 8, 1969 Piper Aircraft and Bangor Punta issued a press release announcing that agreement (R.329A-330A).

Thereafter, between May 14 and 23 Bangor Punta purchased 120,200 shares of Piper Aircraft common stock in privately negotiated transactions. The purchases were publicly announced when made (R.374A). Neither Piper Aircraft nor the Piper individuals participated in or had any prior knowledge of them.

On May 29 Bangor Punta filed its registration statement for the exchange offer, which became effective on July 18. Bangor Punta acquired an additional 110,802 Piper Aircraft shares on the offer and owned 732,092 shares, amounting to 44.5% of the outstanding shares.

As indicated above, after its tender offer closed, Chris-Craft filed a registration statement with the SEC for an exchange offer for Piper Aircraft shares. The exchange offer, which became effective on May 19, was for a minimum of 80,000 shares (R.456A). The minimum number of shares was not tendered and on July 24, while Bangor Punta's exchange offer was effective, Chris-Craft made a second exchange offer for up to 300,000 shares, with no minimum (*ibid.*). That exchange offer expired on August 4 with 112,089 Piper Aircraft shares tendered (R.476A). As a result, Chris-Craft owned 668,295 shares, or 40.6% of the outstanding shares.

At the conclusion of the Chris-Craft and Bangor Punta exchange offers neither company had a majority of the

shares. Between August 12 and August 18 Chris-Craft purchased an additional 29,200 shares for cash and then ceased all purchases (R.481A). It thus owned 697,495 shares, amounting to 42.4% of the outstanding shares.

Beginning on August 8 Bangor Punta made open market purchases of Piper Aircraft shares. By September 5, Bangor Punta had purchased an additional 100,614 shares, giving it 832,706 shares, or 50.6% of the outstanding shares.*

As the District Court observed, the "contest for control was over except for the litigations questioning the actions of the parties along the way which has embroiled them in claims and counter-claims" (A-131).

c. The Proceedings Below

On May 22, after public announcement of Bangor Punta's acquisition of the Piper family's shares and the 120,200 privately purchased shares, Chris-Craft commenced this action. Named as defendants were Piper Aircraft and the five members of its Board of Directors who were not Chris-Craft's representatives (although only Piper Aircraft and the Piper individuals were served), Bangor Punta and its Board of Directors (with only two members served), and First Boston and two of its officers, both of whom were served. After the Court of Appeals decision on liability Chris-Craft stipulated to dismiss the action as to them (B-44, n. 1).

The complaint, which sought equitable relief and damages, alleged violations of § 5(c) of the Securities Act of 1933, 15 U.S.C. § 77e(c) and Rule 135 promulgated thereunder, 17 C.F.R. § 230.135, and of §§ 9, 10(b), and 14(e)

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* For the convenience of the Court, Addendum I to this brief contains a chronological listing of all purchases of Piper Aircraft shares made by both Bangor Punta and Chris-Craft.

of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j(b) and 78n(e), and Rules 10b-5 and 10b-6 promulgated thereunder, 17 C.F.R. §§ 240.10b-5 and 240.10b-6.

1. Chris-Craft's Motion for a Preliminary Injunction in July 1969

On July 23, while Bangor Punta's exchange offer was open, Chris-Craft moved for a preliminary injunction to prevent Bangor Punta from gaining or exercising control of Piper Aircraft. The motion charged that Piper Aircraft's support of Bangor Punta's exchange offer was unlawful under Section 14(e); that Bangor Punta's May 8 press release was an offer to sell securities in violation of § 5(c) of the 1933 Act and Rule 135 thereunder; and that Bangor Punta's negotiated purchases of the 120,200 shares constituted a violation of Rule 10b-6.

Judge Tenney of the United States District Court for the Southern District of New York held there were no violations and denied the preliminary injunction on August 19 (303 F. Supp. 191; C-32). Chris-Craft appealed only with respect to Bangor Punta. The Court of Appeals, en banc, affirmed the denial of the injunction (426 F.2d 569; C-1) since:

> "Chris-Craft was free to compete equally with Bangor Punta for the remaining Piper shares, and it did so. We do not understand Chris-Craft to allege that prior misdeeds of Bangor Punta so determined the course of the competition for shares after the date of the decision below that Chris-Craft was placed at any real disadvantage" (C-9).

However, it disagreed with the rationale of the District Court with respect to § 5(c) and Rule 10b-6 and remanded the case for further proceedings (C-18).

2. The First Trial of the Action in March 1971

The action was tried before Judge Milton Pollack of the United States District Court for the Southern District

of New York sitting without a jury. It began on February 6, 1971, was adjourned to March 9, 1971 and continued until concluded on March 19, 1971.* In December, 1971 the District Court dismissed Chris-Craft's complaint against all defendants (A-161).

At trial, Chris-Craft claimed that the two letters sent by Piper Aircraft on January 27 and 28, recommending that shareholders not accept Chris-Craft's tender offer, were materially misleading in violation of Rule 10b-5 and Section 14(e). Those letters conveyed the reasons why Piper Aircraft's Board of Directors believed the shareholders should reject Chris-Craft's tender offer. Among the reasons stated was the belief of the Board that the offer was "inadequate and not in the best interests" of the Piper Aircraft shareholders (R.242A; R.246A).

Chris-Craft claimed that the letters "could not be read to refer to any inadequacy of the Chris-Craft offer other than in respect to price and—to establish Piper's bad faith and intention to mislead" it pointed out that First Boston "had advised Piper [Aircraft] that $65 per share was a fair price" and the agreement with Grumman "contemplated a sale of Piper [Aircraft] stock at $65 per share" (A-135).**

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* The trial was held concurrently with two related cases brought by Bangor Punta against Chris-Craft and by the SEC against Bangor Punta. Neither Piper Aircraft nor the Piper individuals were parties to either of the other two actions. Piper Aircraft's counterclaim against Chris-Craft was tried at the same time. Judge Pollack dismissed the counterclaim (A-162) and Piper Aircraft did not appeal the dismissal (A-21, n. 7).

** The "advice" was the view of Paul Miller, President of First Boston, that the $65 price was a "fair price", but because the tender offer was limited to 300,000 shares, the offer as a whole was inadequate (Pl. Ex. 78F; R.Ev. 460, 465; Trial Tr. 1271). The contemplated sale to Grumman at $65 per share, of course, was announced as soon as agreement was reached the very next day (R.266A).

The District Court rejected Chris-Craft's claim. It found that the word "inadequate" could not be construed as referring solely to the price, and if it were, the statement "would be more fatuous than misleading" because any "shareholder with a telephone or a newspaper at hand could compare the current market for Piper [Aircraft] shares with Chris-Craft's offer" (A-135). That comparison would have shown that the $65 price was about $12.50 more than the market price for Piper Aircraft shares on the New York Stock Exchange the day before the tender offer was made. It found further that the word "inadequate" referred to the entire limited tender offer not just to the $65 price and reflected Piper Aircraft management's views on the prospects of Piper Aircraft and its unflattering views of Chris-Craft's management (A-135 to A-136).

Chris-Craft also challenged the Grumman transaction as a sham, entered into solely to interfere with its tender offer. The agreement contemplated that if merger negotiations between Piper Aircraft and Grumman proved fruitless, Grumman had the right after six months to require Piper Aircraft either to repurchase the 300,000 shares or find another buyer at Grumman's cost plus nominal interest (R.261A). The District Court found that the transaction was not a sham and that the repurchase provisions were rational steps for Piper Aircraft and Grumman to take (A-136). Accordingly, it rejected Chris-Craft's claims as "unfounded" (A-138).

Although Chris-Craft challenged other matters in which Piper Aircraft participated after January 29, none of them were found unlawful (A-138; A-147).* The District Court, therefore, dismissed the complaint against Piper Aircraft and *"a fortiori"* against the Piper individuals (A-161).

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* At the trial Chris-Craft also raised claims under Rule 10b-5 against Piper Aircraft asserting it was defrauded in connection with the purchases it made. The District Court rejected Chris-Craft's claims (A-136 to A-137; A-153 to A-157) and Chris-Craft's appeal did not raise those issues (A-21, n. 7).

The other events challenged by Chris-Craft, viz. Bangor Punta's purchase of 120,000 shares allegedly in violation of Rule 10b-6 and the nondisclosure of Bangor Punta's consideration of disposing of the Bangor and Aroostook Railroad, did not involve, and were not in any way attributable to, Piper Aircraft or the Piper individuals. They were unaware of the transactions and did not participate in them. Those issues, therefore, will not be discussed in this brief.*

3. The Court of Appeals Reversal of the District Court in March 1973

On Chris-Craft's appeal the Court of Appeals reversed the District Court. It found the Piper individuals, but not Piper Aircraft, liable to Chris-Craft for violation of Section 14(e) solely in connection with the January communications.

The Court of Appeals began its decision with a discussion of what it perceived as "the proper function of the private action for damages in the overall pattern of enforcement of the federal securities laws" (A-21). It declared that "vigorous enforcement of the federal securities laws, particularly the antifraud provisions, can be accomplished effectively only when implemented by private damage actions" (A-22). "This policy of vigorous enforcement through private litigation" it said, has resulted in "a broadening of standing to sue and a relaxation of the elements of proof in a private action" (*ibid.*). It asserted that the "scienter requirement in a Rule 10b-5 private damage action appears to have been reduced to a knowledge of falsity or reckless disregard for the truth standard" (*ibid.*). Later in the opinion Judge Timbers declared that "intent to defraud is not an indispensable element in a

* The questions concerning standing, scienter and damages raised by those issues are applicable, however, to the Piper individuals as well. To the extent they are not covered in this brief we respectfully refer to the positions taken by First Boston and Bangor Punta in their respective briefs.

private action under Rule 10b-5" (A-35). With respect to the reliance requirement, the court observed that the standard "has been relaxed under certain circumstances; for example, if a material omission or misstatement is proven, a presumption may be raised that the plaintiff relied on the deception to his detriment" (A-22 to A-23).*

Applying these principles, the Court of Appeals held that Chris-Craft had standing to sue for damages under Section 14(e). Analogizing Chris-Craft's claim to the common law tort of interference with a "prospective advantage," the court would "not infer from the silence of the statute that Congress intended to deny a federal remedy and to extinguish a liability which, under established principles of tort law, normally attends the doing of a proscribed act" (A-30). With respect to whether Section 14(e) was violated, the court followed "the principles developed under Rule 10b-5 regarding the elements of such violations" (A-34). It held that "a violation of § 14(e) is shown when there has been a material misstatement or omission concerned with a tender offer and when such misstatement or omission was sufficiently culpable to justify granting relief to the injured party" (*ibid.*). Liability under Section 14(e) is determined, said the court, when "plaintiff has established that defendant either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort" (A-37).

Judge Timbers, writing for the panel, disagreed with the District Court with respect to the January 27 and 28 letters to shareholders, which recommended that share-

* "Discernment must be exercised in determining whether a particular violation of an antifraud provision brings into play the policy of vigorous enforcement with all its effects" stated the court in a footnote, since "the harm caused by the violation may not be regarded as sufficiently momentous to justify a dilution of the standards of proof normally required in an action for fraud" (A-24, n. 8).

holders reject Chris-Craft's tender offer because in management's opinion, among other faults, it was inadequate. He declared that a "reasonable shareholder reading the letter most likely would assume that the reference was to price" and that since "price usually is what a person contemplating a sale of shares is most concerned with, a prudent shareholder naturally would assume that the Piper family was addressing itself to that consideration in opposing the offer. If the Piper family intended to refer to other factors, it surely would have been more specific" (A-38).* The Piper individuals were therefore held to have violated Section 14(e) "when they sent out these shareholder letters knowing that they were materially misleading" (*ibid.*).

The Court of Appeals also reversed the District Court with respect to the Grumman transaction. It agreed with the District Court that the transaction was not a sham, but held that the announcement and letter of January 29 were misleading because they failed to mention the repurchase provisions of the agreement (A-39). The Piper individuals were held to have violated Section 14(e) because they "recklessly disregarded" what the Court of Appeals defined as their "obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper [Aircraft] shareholders toward the [Chris-Craft] tender offer" (A-40).

Having found the January communications misleading, the Court of Appeals assumed that the communications "misled the Piper [Aircraft] shareholders into believing that [Chris-Craft's] tender offer was undesirable" (A-62). Chris-Craft's tender offer, it declared,

> "could be fruitful only if Piper [Aircraft] shareholders believed that the price was currently a fair one

* Although the parties had stipulated in the trial court that the "Piper family" referred to 43 individuals, trusts and corporations, throughout its opinion the Court of Appeals referred to the Piper individuals as the "Piper family."

> and would remain so for at least a reasonable period in the future. The fairness of the offer is demonstrated by the fact that, despite the misrepresentations of the Piper family, over 300,000 shares were tendered. Considering the soundness of the offer and the materiality of the Piper family's deceptions, it is a reasonable presumption that [Chris-Craft] was unlawfully denied the opportunity to purchase additional shares" (*ibid.*).

The Court of Appeals majority, continuing with what Judge Mansfield in dissent called a "fanciful assumption" amounting to "rank speculation," (A-115), surmised that

> "these misleading statements most likely had a continuing adverse effect on [Chris-Craft's] attempts to acquire Piper [Aircraft] shares. When Piper [Aircraft] shareholders were deciding whether or not to accept [Chris-Craft's later] exchange offer, many undoubtedly remembered and were influenced by the Piper family's misleading January statements portraying [Chris-Craft] as a company that made inadequate and unfair offers" (A-62 to A-63).

Having found material misrepresentations, and presuming reliance by shareholders upon them, the Court of Appeals majority concluded that

> "considering the narrow margin of victory here, the Piper family's misstatements and omissions in the January shareholder letters and the Grumman press release denied to [Chris-Craft] a fair opportunity to win the contest for control" (A-63).*

* Although the Court of Appeals also reversed the District Court and found that letters written to shareholders in June and July recommending against accepting Chris-Craft's exchange offers and in favor of Bangor Punta's exchange offer were misleading (A-40 to A-41), the court held they did not harm Chris-Craft (A-63). Judge Tenney, in denying Chris-Craft's motion for a preliminary injunction in August 1969, had similarly rejected Chris-Craft's contentions concerning those letters as "unsound" (C-43 to C-44).

The court held that Piper Aircraft was not liable to Chris-Craft, although the Piper individuals were. In a passing reference in a footnote, the Court of Appeals majority stated that the "evidence shows that members of the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests" (A-68, n.31).

Finally, the Court of Appeals agreed with the District Court that Chris-Craft failed to prove it would have obtained control but held that since Bangor Punta's violations gave it control of Piper Aircraft (A-56; A-66), Chris-Craft was denied "a fair opportunity to compete for control" (A-60; A-66). It concluded that "the conduct of each of the defendants, through their violations of the securities laws, contributed to the success" of Bangor Punta's takeover and directed that all defendants be held jointly and severally liable (A-69).

Judge Mansfield dissented with respect to the Piper individuals since Chris-Craft had failed to prove that it suffered any loss as a result of the January communications (A-113). He pointed out that the District Court found that Chris-Craft was not seeking more than 300,000 shares on its tender offer and that Chris-Craft did not have sufficient funds to purchase any significant amount of shares in excess of 300,000 (*ibid.*). He further demonstrated that in the final analysis Chris-Craft's failure to purchase control of Piper Aircraft was the result of its having run out of cash in August and September when Bangor Punta was able to purchase over 100,000 additional shares for cash (A-114 to A-116). Judge Mansfield concluded:

> "Thus there has been a complete failure to show that the Piper family's January letters and press release, which form the sole basis for the majority's decision

> holding liable the Piper family defendants, caused any damage to [Chris-Craft]" (A-116).*

4. The Trial on Remand in April 1974

In April 1974 Judge Pollack conducted the trial on remand to assess damages. The Court of Appeals had held that what the violations found had "caused was a denial to [Chris-Craft] of a fair opportunity to compete for control of Piper [Aircraft]. The specific injury sustained was a reduction in the value of [Chris-Craft's] Piper [Aircraft] holdings upon [Bangor Punta's] unfairly obtaining control" (A-60). Evidence was presented to Judge Pollack on the reduction in value of Chris-Craft's Piper Aircraft shares attributable to Bangor Punta's acquiring a majority of the shares. Since the District Court had found, and the Court of Appeals agreed, that Chris-Craft failed to prove it would have acquired control but for the alleged violations, what Chris-Craft lost was the opportunity to get control. Based upon the evidence the District Court found that

> "actual majority control was worth between 5% and 10% above fair market value of Piper [Aircraft] stock in the circumstances of this case with a bloc of 37% or 42% of the total capital opposing the majority. Certainly then, the *opportunity* (speculative at best) of gaining a majority from a 42% plurality is generously valued at 5% above fair value of the stock, in such circumstances" (B-70; emphasis the court's).

The District Court, therefore, granted Chris-Craft damages equal to five percent of the fair market value of the stock ($2.40 per share) times the total number of shares owned by Chris-Craft on September 5, when Bangor Punta ac-

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* In view of the brevity of the discussion in the opinions below of the liability of the Piper individuals, those portions of the opinions are reprinted in Addendum II to this brief.

quired majority control (697,495), for total damages of $1,673,988. In the exercise of his discretion, Judge Pollack also awarded Chris-Craft prejudgment interest which amounted to $599,010.89.*

5. The Court of Appeals Reversal of the Damage Formulation in April 1975

The Court of Appeals reversed the District Court's award of damages in April 1975. It held that its mandate that the "measure of damages should be the reduction in the appraisal value of [Chris-Craft's] Piper [Aircraft] holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position" (A-69) required the District Court to measure damages based upon the difference between Chris-Craft's costs (B-22) and the amount Chris-Craft could have received had it sold its shares after Bangor Punta acquired control (B-23). The Court hypothesized that a sale could not have occurred until January 1970. By that time the stock market had substantially declined, but the Court of Appeals held that "there is no inequity under these circumstances in shifting the entire burden of [Chris-Craft's] loss to defendants" (B-27).

Chris-Craft's damages were calculated to be the difference between the average price it paid for each share of stock it purchased ($63.98) and the price per share it could have obtained in January 1970 ($27.00), $36.98 per share, amounting to $25,793,365 for Chris-Craft's bloc of 697,495 shares (B-31). Finally, the Court "affirmed" the award of prejudgment interest (B-32), thus adding more than $10 million to Chris-Craft's judgment.

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* The Court of Appeals also directed that the District Court on remand enter an injunction against Bangor Punta with respect to the 120,200 shares purchased for cash in May and the 110,802 shares obtained on its July exchange offer.

Summary of Argument

The Court of Appeals twice reversed the District Court by purporting to apply legal standards allowing vigorous enforcement of the securities laws through private actions. Its perception of those standards has been repudiated by this Court. For example, the perceived "broadening of standing to sue" (A-22) was rejected in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975). The "relaxation of the elements of proof in a private action" (A-22) was disallowed by this Court in *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49 (1975). There the Court declared that a plaintiff still has the burden of establishing the traditional prerequisites of relief and reaffirmed the principle of *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 389 (1970) that "damages should be recoverable only to the extent that they can be shown."

The standard of scienter, said the Court of Appeals, "appears to have been reduced to a knowledge of falsity or reckless disregard for the truth" (A-22) and specifically held that "intent to defraud is not an indispensable element" (A-35). This Court, however, has since held that scienter requires an intent to deceive, manipulate or defraud. *Ernst & Ernst* v. *Hochfelder,* —— U.S. ——, 96 S.Ct. 1375 (1976).

In determining whether Section 14(e) has been violated, the Court of Appeals declared that it would "follow the principles developed under Rule 10b-5" (A-34). If a "misstatement or omission was sufficiently culpable to justify granting relief to the injured party", it said (A-34), a violation would be found. The court even noted that to bring into play the policy of vigorous enforcement of the securities laws depends on whether the court regards the harm "as sufficiently momentous to justify a dilution of the standards of proof normally required in an action for fraud" (A-24, n. 8). In *Blue Chip Stamps, supra,* this

Court directly rejected such a "shifting and highly fact-oriented disposition" as an unsatisfactory basis for a "rule of liability imposed on the conduct of business transactions" (421 U.S., at 755).

By permitting Chris-Craft's recovery, the Court of Appeals eliminated a basic element of tort law, causation in fact. Based upon its view of what shareholders "would assume" or what would be "likely to affect" them, the Court of Appeals determined that shareholders interpreted the January communications as it did; assumed that in reliance on that interpretation shareholders did not tender to Chris-Craft and presumed that Chris-Craft was denied the opportunity to purchase additional shares (A-62).

The Court of Appeals excused Chris-Craft from not purchasing shares subsequent to its tender offer although some were available at less than $65 (A-114). It accepted testimony of a Chris-Craft witness who was disbelieved by the District Court, announced that "it appears" financing was available and was "satisfied" that Chris-Craft could and would have purchased more shares on its tender offer (A-62). Having completely satisfied Chris-Craft's burden of proof, the Court of Appeals determined that "considering the narrow margin of victory here", the January events contributed to Chris-Craft's loss by denying it "a fair opportunity to win the contest for control" (A-63).

The Court of Appeals thus diluted the appropriate standards of proof in order to implement a policy, created by the court itself, of "vigorous enforcement" of Section 14 (e) of the Williams Act on behalf of an offeror.

The legislative history of the Williams Act, of which Section 14(e) is a part, makes it clear that its purpose is to protect shareholders not offerors and not management. Congress was concerned that shareholders, when confronted with a tender offer, be given sufficient information to enable them to make an informed judgment as to

whether or not to accept that offer. The Court of Appeals decision grossly misapplied Section 14(e) and permitted the tender offeror to obtain greater advantages than would the shareholders themselves. The result gives the loser in a contested tender offer advantages which far outweigh the evil which Congress sought to prevent, and tips the balance of regulation in favor of the person making the takeover bid.

In addition to dispensing with proof of the traditional prerequisites for relief, the Court of Appeals created a new form of relief by holding the Piper individuals jointly and severally liable even though they did not participate in the events which were presumed to have caused Chris-Craft's alleged damages. If their alleged violations in January caused any injury (something Chris-Craft never proved), it was separate from and independent of Bangor Punta's later conduct. The Piper individuals had nothing to do with Bangor Punta's alleged violations.

Apart from improperly imposing personal joint and several liability, the Court of Appeals damage formulation compensates Chris-Craft for a market decline between the time of the alleged violations in January 1969 and the hypothetical sale date in January 1970. Under Section 28(a) of the 1934 Act, however, liability may only be imposed for the "actual damages on account of the act complained of" not for damages caused by independent market forces.

In effect, the decision gives a tender offeror a complete insurance policy against risks of loss should its tender offer fail. If Section 14(e) is construed to give the loser standing to sue merely because he lost and the benefit of assumptions, presumptions and market declines, the purpose of Section 14(e) to keep shareholders informed will be stretched well beyond the limits intended by Congress.

ARGUMENT

The Williams Act was enacted to provide disclosure of material information to shareholders by a person making a tender offer; its enforcement does not require judicial elimination of the traditional prerequisites of relief

The Williams Act of which Section 14(e) is a part was enacted in 1968, as an amendment to the Securities Exchange Act of 1934. Its purpose was to require disclosure to shareholders of the identity, financial arrangements and plans of the person making a takeover bid. Most of the provisions of the Act specify the information which the bidder must furnish when he accumulates the requisite percentage of stock [Section 13(d)] or when he makes a tender offer to acquire that percentage [Section 14(d)].*

The Act does not expressly create a private right of action for violation of its provisions. While this Court has "not hesitated to recognize the power of federal courts to fashion private remedies for securities laws violations when to do so is consistent with the legislative scheme and necessary for the protection of investors as a supplement to enforcement by the Securities and Exchange Commission," *Rondeau* v. *Mosinee Paper Corp., supra,* 422 U.S., at 62, nevertheless "it by no means follows that the plaintiff in such an action is relieved of the burden of establishing the traditional prerequisites of relief" (*id.,* at 63).

We shall demonstrate in part a (pp. 26-35) that the Court of Appeals, in order to enforce its perception of the

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* As originally enacted in 1968 the percentage was 10%. By P.L. 91-567, adopted December 22, 1970, the percentage was reduced to 5%. See, *Rondeau* v. *Mosinee Paper Corp.,* 422 U.S. 49, 55, n. 4 (1975).

legislative purpose of Section 14(e), relieved Chris-Craft of the burden of establishing the elements necessary to obtain relief against the Piper individuals.

The Senate Report accompanying the Williams Act described the alternatives available to a shareholder when suddenly confronted with a tender offer [S. Rep. No. 550, 90th Cong., 1st Sess., p. 2 (1967)]:

> "He can tender all of his shares immediately and hope they are all purchased. However, if the offer is for less than all the outstanding shares, perhaps only a part of them will be taken. In these instances he will remain a shareholder in the company, under a new management which he has helped to install without knowing whether it will be good or bad for the company.
>
> "The shareholder, as another alternative, may wait to see if a better offer develops, but if he tenders late, he runs the risk that none of his shares will be taken. He may also sell his shares in the market or hold them and hope for the best. Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision."

In *Rondeau, supra,* 422 U.S., at 58-59 this Court observed:

> "By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the 'extreme care' which was taken 'to

avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid' ".

We shall demonstrate in parts b and c (pp. 35-46) that the Court of Appeals' decisions not only tip the balance of regulation against management, but give the offeror greater protection than the shareholders are afforded, yet the shareholders are the class Congress intended to protect.

In part d (pp. 46-50) we shall demonstrate that the damages awarded against the Piper individuals are far in excess of the actual damages on account of the acts complained of in contravention of Section 28(a) of the 1934 Act.

a. By Presuming Both Causation and Injury the Court of Appeals Extended Section 14(e) Beyond Its Intended Limits.

Chris-Craft's tender offer on January 23, 1969 was for up to 300,000 shares. At the time, there were over 1,400,000 shares outstanding in the hands of other shareholders.* The price on the tender offer was $65 per share, $12.50 more than the market price. Piper Aircraft shareholders holding 304,606 shares accepted the offer. Since the offer was limited to 300,000 shares, other shareholders did not tender, but sold their shares on the New York Stock Exchange instead for less than $65 per share. Indeed, Chris-Craft stipulated in the trial court that while its tender offer was open it purchased 38,800 of the 97,500

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* Piper Aircraft had 1,644,790 shares outstanding in 1969 (B-5, n. 3; Addendum I, *infra*). By January 23, Chris-Craft had purchased over 200,000 shares for cash (B-4 to B-5; Addendum I, *infra*).

shares traded during the period on the New York Stock Exchange (R.272A).

The remaining shareholders did not tender their shares to Chris-Craft during the tender offer. Some subsequently sold their shares on the New York Stock Exchange for prices higher than $65 (R.651A); others sold to Bangor Punta for cash in May, again at prices higher than $65 per share (R.389A; R.395A; R.397A; A-16); some tendered their shares to Chris-Craft on its exchange offer in July, receiving a package of securities valued higher than $65 per share (A-140, n. 10); some tendered their shares to Bangor Punta on its exchange offer in July, also receiving a package of securities valued higher than $65 per share (*ibid.*); still others did not tender to either Bangor Punta or Chris-Craft but sold them in August and received more than $65 per share (R.654A); finally, some shareholders retained their shares and either sold them much later or hold them to this day.

The Piper Aircraft shareholders thus took advantage of all the various alternatives available to them.

The Court of Appeals, however, conclusively presumed that the shareholders who received Piper Aircraft's January 27 and 28 letters were misled. Those letters gave management's reasons why shareholders should reject Chris-Craft's tender offer. Those reasons included management's views on the prospects of Piper Aircraft in the general aviation industry as well as the probability—which later became a reality—that more would be offered for the shares, and their opinion that since the offer was a limited one not all shares would be accepted and, therefore, the offer as a whole was inadequate. The District Court found that this was the proper interpretation of the letters. The Court of Appeals disagreed. It ignored the many other paragraphs of the letters and focused solely on management's opinion that the offer was inadequate;

it then decided that a shareholder "most likely would assume" that the reference was to price and conclusively presumed that this was a material misrepresentation upon which an unspecified number of unidentified shareholders relied in not tendering to Chris-Craft.

The Court of Appeals approach ignores the circumstances and other portions of the letters, adopts the least appropriate interpretation of them and converts an honestly held opinion into a misrepresentation of fact. The standard of materiality thus applied amounts to an assumption that shareholders would interpret the letters only one way and that some unspecified number of them would be influenced by that interpretation and not tender.

In *Smallwood* v. *Pearl Brewing Company,* 489 F.2d 579, 604 (5 Cir.), cert. denied, 419 U.S. 873 (1974), the Fifth Circuit pointed out that this Court did not intend "to replace the traditional standard with a more relaxed one. There is no evidence of any desire by the Court to relax the standard of materiality to a mere possibility of influence upon a reasonable investor," on the contrary, it said, "the Court in *Mills* emphasized that the test of materiality required 'a significant *propensity* to affect the voting process', 396 U.S. at 384 (emphasis original)."

It may well be that a "misrepresentation" in a proxy statement has a propensity to affect a shareholder's decision on how he will vote on a corporate transaction. We submit, however, that the same "misrepresentation" has no effect on an investor's decision to buy or sell stock. Management's opinion that a limited tender offer is inadequate cannot be conclusively presumed to affect a shareholder's decision not to tender. That decision is uniquely individual to each shareholder and depends on his financial condition and many other factors. "The price of a stock in the general market is controlled not only by the price-earnings ratios and such other mathematical formulae, but by the intuition or 'hunch' of the buyers

and sellers of the stock. Once this element of pricing is exposed it follows necessarily that the adequacy or inadequacy of price is subjective." *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co., Inc.,* 356 F. Supp. 1066, 1071 (S.D.N.Y.), *aff'd,* 476 F.2d 687 (2 Cir. 1973).

Here, the District Court found that "inadequate" referred to factors other than price, such as "management's views as to company prospects or as to the quality of Chris-Craft management, should Chris-Craft acquire control" (A-136). The Court of Appeals disagreed. It held the material misrepresentation consisted of not being "more specific" that the inadequacy referred to other factors and not just the price (A-38). Hence, for alleged failure to fulfill "a special responsibility to be meticulous and precise in their representations to shareholders" (*ibid.*) the Piper individuals were found to have violated Section 14(e).

Similarly, the Court of Appeals conclusively presumed that the announcement of the Grumman transaction, without setting forth all the terms, was a material omission upon which shareholders relied in not tendering to Chris-Craft. Although the press release and letter nowhere mentioned Chris-Craft or its tender offer, the Court of Appeals held they were "in effect" in "the nature of counter-solicitations" to Chris-Craft's tender offer (A-33, n. 12).

In *Smallwood* v. *Pearl Brewing Company, supra,* 489 F.2d, at 601, the Fifth Circuit observed that "statements describing an event that has just occurred should be examined under a less powerful glass than similar statements made after a period sufficient for careful study and reflection has passed." See, also, *e.g. Susquehanna Corp.* v. *Pan American Sulphur Co.,* 423 F.2d 1075, 1085 (5 Cir. 1970). The Court of Appeals here, however, parsed the Grumman announcement microscopically (A-39) and held that the Piper individuals violated Section 14(e) by "fail-

ing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper [Aircraft] shareholders" towards Chris-Craft's tender offer (A-40). This Court observed in *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S., at 746-7, n. 10, however, that "[o]wnership of stock or receipt of a prospectus says little about whether a plaintiff's investment decision was affected by a violation of Rule 10b-5 or whether a decision was even made."

Having relaxed the standard of materiality, the Court of Appeals proceeded to eliminate Chris-Craft's burden of proving the necessary causal connection between the "material misrepresentations" and its injury.

The Ninth Circuit observed in *Royal Air Properties, Inc.* v. *Smith,* 312 F.2d 210, 213 (9 Cir. 1962): "Since civil liability was judicially implied, the appropriate common law defenses should be applicable. It would be inconsistent to apply these defenses to a remedy specifically provided by Congress and not to a remedy judicially inferred from an act of Congress." One of the most traditional of common law defenses is that a defendant only "is liable to respond in such damages as naturally and proximately result from the fraud." *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 303 F.2d 527, 533 (10 Cir. 1962).

The principle of causation in fact is a basic element of tort law. A plaintiff "must establish that the deceptive conduct was the cause of the damage," *Adair* v. *Schneider,* 293 F. Supp. 393, 396 (S.D.N.Y. 1968). "Although facts meeting the 'but for' test will not necessarily establish proximate cause, the failure to satisfy that test necessarily negates the possibility of proximate cause. Satisfaction of the 'but for' test is a minimum requirement of proximate causation." *Hoover* v. *Allen,* 241 F. Supp. 213, 231 (S.D.N.Y. 1965).

Here, of course, the Court of Appeals did not require proof that but for the letters to shareholders in January 1969 Chris-Craft would have acquired control of Piper Aircraft. Indeed, it did not even find that Chris-Craft was attempting to obtain control on its cash tender offer. It could not do so because Chris-Craft had expressly stated in its tender offer that it did not have any specific plan or proposal to acquire control of Piper Aircraft and that the purchases were made only for investment with a "view" towards control (B-61).* The Court of Appeals majority was "satisfied" that Chris-Craft had "a desire to purchase, and was capable of purchasing, a substantial number of additional shares pursuant to its tender offer" (A-62). It therefore conclusively presumed that Chris-Craft "was unlawfully denied the opportunity to purchase additional shares" (*ibid.*).

Chris-Craft, however, was not held entitled to be compensated by the Piper individuals for its inability to purchase those additional shares on its tender offer. That was not the injury for which Chris-Craft was awarded $36 million in damages. Its injury, the Court of Appeals held, was the decline in the value of the Piper Aircraft shares "with which it became encumbered" when Bangor Punta acquired control of Piper Aircraft in September 1969 (A-60). "The measure of damages," the Court specifically directed, "should be the reduction in the appraisal value of [Chris-Craft's] Piper [Aircraft] holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position" (A-69). This damage formulation completely eliminated as a prerequisite to relief against the Piper individuals any proof that their alleged 14(e) violations in January caused Chris-Craft's injury in September.

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* The draft of Chris-Craft's tender offer originally stated that Chris-Craft "intends through this Offer to acquire control of Piper" (Def. Ex. D; R.Ev. 705; R.1328A). The draft was changed before the tender offer was made (R.1329A).

The elimination of that requirement negated Chris-Craft's admission that despite the alleged violations in January it was still able thereafter either to obtain control or to dispose of its shares without loss and possibly some profit (R.1338A-1340A; R.1556A-1557A). Chris-Craft stipulated at trial that both before and after Chris-Craft closed its cash tender offer on February 3 some shares of stock were available for purchase at less than $65; Chris-Craft did not purchase them (R.272A; R.285A). Chris-Craft admittedly was aware in February 1969 that the Fund of Funds held a substantial number of Piper Aircraft shares; it declined to purchase them (A-115). If funds were available, as the Court of Appeals was "satisfied" was the case, Chris-Craft did not have to proceed by exchange offers in May and July 1969; it could have purchased the shares for cash prior to May; and could have purchased shares for cash after its exchange offer closed in August; alternatively, it could have tendered its shares to Bangor Punta on the Bangor Punta exchange offer. Had Chris-Craft followed any one of those courses it would not have been "encumbered" with a minority bloc of stock in a declining market. It certainly would not have been caused to have suffered over $36 million in damages.

"Under the familiar mitigation of damages principle, a party cannot recover that part of his loss caused by his own failure, once he has reason to know of the breach, to take reasonable steps to avoid further harm." *Foster* v. *Financial Technology Inc.*, 517 F.2d 1068, 1072 (9 Cir. 1975). As stated by Judge Friendly in *Ellerman Lines, Limited* v. *The President Harding*, 288 F.2d 288, 290 (2 Cir. 1961):

> "Perhaps as good a way to state the rule as any is that a tort defendant is not liable for consequences preventable by action that reason requires the plaintiff to take; per contra if the plaintiff takes such action within the range of reason, the defendant is liable for further damages resulting therefrom. It seems unnecessary to follow McCormick, pp. 127-128, and the Restatement, p. 602, in finding the root of this rule in a policy of discouraging persons from 'wasting their resources both physical or economic'; it is enough that the community's notions of fair compensation to an injured plaintiff do not include wounds which in a practical sense are self-inflicted."

Indeed, as the Ninth Circuit stated in *Foster* v. *Financial Technology, supra*, 517 F.2d at 1072, "at the point where a reasonable man—either because of the breach or discovery of the fraud—would have taken action to protect himself from further depreciation in the value of the claim, the chain of causation is cut and plaintiffs cannot recover damages for subsequent losses."

Here, of course, at the time of suit in May 1969 Chris-Craft admittedly had no loss as a result of the January events. "By continuing to hold the stock after that date" Chris-Craft "has, in effect, made a second investment decision unrelated to his initial decision to purchase the stock" *Harris* v. *American Investment Company*, 523 F.2d 220, 228 (8 Cir. 1975), cert. denied, 44 U.S.L.W. 3398 (Jan. 13, 1976). Thus, "what happens after this second decision has no bearing whatsoever on the measure of plaintiff's damages" (*ibid.*).

The Court of Appeals held here that Chris-Craft "was not required to mitigate damages by dropping out of the contest" (A-61). By the same token, it should not have been permitted to magnify its recovery from the Piper individuals by its own actions which the Piper individuals were powerless to prevent. Chris-Craft, by its own admission, had not suffered any decline in the value of the shares it had purchased and could have disposed of those shares without loss and possibly some profit as late as May. Nevertheless, it was permitted to recover from the Piper individuals for injuries self-inflicted months after the alleged violations.

Judge Mansfield in his dissent relied upon this Court's decision in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970), that "damages should be recoverable only to the extent that they can be shown," and pointed out that Chris-Craft failed to show that it suffered some resulting loss from the January communications (A-113).

The Court of Appeals majority upheld the District Court's finding that Chris-Craft failed to prove it would have acquired control of Piper Aircraft, but permitted Chris-Craft to recover damages solely because Bangor Punta acquired control in September following its alleged violations of Rule 10b-6 and Section 14(e) in May and July. The Piper individuals had nothing to do with either of those alleged violations. Their acts, even if violations in January, did not cause Chris-Craft to lose the control battle in September.

To the extent that Bangor Punta acquired 14% of the stock unlawfully by means of its alleged violations of Rule 10b-6 and Section 14(e) those shares were denied to Chris-Craft. Those transactions, however, occurred three or more months after the tender offer closed. During those months Chris-Craft was free to purchase those shares but declined to do so.*

There is no claim that those shares would have been tendered to Chris-Craft in January were it not for the letters to shareholders. Indeed, there was no evidence that any additional shares would have been tendered

* Chris-Craft argues that once it filed its registration statement for its exchange offer it was precluded from purchasing shares by the SEC's interpretation of Rule 10b-6. The argument is fallacious. It does not even claim to have learned of the SEC's interpretation until April (R.1211A; R.1537A). If, as it now claims, it had cash available, nothing prevented Chris-Craft from purchasing for cash before then and withdrawing the registration statement and purchasing for cash thereafter. This it refused to do.

to Chris-Craft. The Court of Appeals simply presumed that those letters denied Chris-Craft the opportunity to purchase an unspecified number of additional shares on its tender offer (A-62). Nothing said or done by the Piper individuals thereafter was found by any court to have harmed Chris-Craft.

As Judge Mansfield observed in his dissent, by the time Bangor Punta entered the contest in May, whatever presumed effect those January communications imposed upon Chris-Craft's ability to purchase shares had long since been dissipated (A-115). Bangor Punta's subsequent and unrelated activity was the superseding cause of the presumed injury for which Chris-Craft was awarded damages. There is no basis for holding the Piper individuals jointly and severally liable with Bangor Punta for them.

b. By Being Permitted to Recover Damages From the Piper Individuals, Chris-Craft Obtained Greater Protection Than the Shareholders.

As pointed out, the purpose of the Williams Act was to assure that the offeror made adequate disclosure to shareholders when making them a tender offer. Permitting the offeror to sue for damages three months after the tender offer closed, at a time when it admittedly had not suffered any loss, is not consistent with the legislative scheme, nor is it necessary for the protection of investors as a supplement to enforcement by the SEC.

The class for whose benefit the Williams Act was passed are the shareholders of the corporation. It is they who are faced with the decision whether to accept or reject the tender offer. It is they whom Congress sought to insure would have proper disclosure. Undoubtedly there may be tender offers where inadequate or misleading disclosures are made; there is no reason why shareholders should not be entitled to recover damages caused thereby. For ex-

ample, if the offeror fraudulently misrepresents his plans with respect to the company, a shareholder who acted in reliance upon those plans would be entitled to recover damages from the offeror, if he can prove them. Conversely, if management of the target company fraudulently advises shareholders that another offer is forthcoming at a higher price, the shareholders who do not tender should be entitled to sue management for their damages, if any.

In these instances there is a clear causal nexus between the violations and the damages. The legislative purpose underlying Section 14(e) is satisfied since the shareholders are protected by being entitled to damages if, during the tender offer when they are required to make their decision, they are given fraudulent information upon which they base their decision. To award the offeror damages in an action commenced months after the tender offer closed does not serve that function.

This Court has recognized under Rule 10b-5 that a party who did not purchase or sell securities in reliance upon alleged misrepresentations may not recover damages. *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. 723. Such a party, however, may seek an injunction to prevent a threatened violation of Rule 10b-5, *Mutual Shares Corp.* v. *Genesco, Inc.,* 384 F.2d 540, 547 (2 Cir. 1967).

Chris-Craft's complaint was framed as seeking injunctive relief and damages as a shareholder, but was converted into a straight damage claim before trial (A-139, n. 8). On appeal, its claimed damages as a shareholder were dropped (A-21, n. 7). Its recovery was based solely upon the Court of Appeals' "belief that the harm done the defeated contestant is not that it had to pay more for the stock but that it got less stock than it needed for control" (A-33).

In *Blue Chip Stamps* this Court was concerned about suits under Rule 10b-5 by a person who did not purchase or sell stock. The concern was "that the door will be open to recovery of substantial damages on the part of one who

offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him" (421 U.S., at 746).

In the present case, Chris-Craft's recovery was not based upon any misrepresentations made to it. Rather, its recovery from the Piper individuals stemmed from assumed inaction by shareholders, presumed to have been in reliance upon letters to them in January. There was no testimony from any shareholder that he recived the January letters, that he paid any attention to them or that he did anything in reliance upon them. Instead, the Court of Appeals assumed each of those elements and disregarded all objective facts which demonstrated that a contrary interpretation was more appropriate.

In *Mills* v. *Electric Auto-Lite, supra,* 396 U.S. 375, this Court held that shareholders to whom a misleading proxy statement was issued could sue either for equitable relief or damages. In *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972), this Court held that shareholders who are deceived into selling their shares may sue the deceivers without positive proof of reliance upon the deception. In both cases, the deception was directed at the plaintiffs. In both cases the plaintiffs were members of the class whose interests were protected by the statute involved, Section 14(a) and Rule 14a-9 in *Mills* and Section 10(b) and Rule 10b-5 in *Affiliated Ute.*

Under the Williams Act the shareholders, not the offeror and not management, were the object of Congressional concern. Only last term this Court observed in *Rondeau* v. *Mosinee Paper Corp., supra,* 422 U.S., at 58:

> "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party."

As in *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S., at 741, the courts "are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question." An argument can be made that both the offeror and management be entitled to seek injunctive relief, while the tender offer is still open, to prevent misleading solicitations or counter-solicitations of shareholders. See, *e.g. Missouri Portland Cement Co., Inc.* v. *Cargill, Incorporated,* 498 F.2d 851, 873-75 (2 Cir.), cert. denied, 419 U.S. 883 (1974); *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co., Inc., supra,* 476 F.2d, at 695-96; *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.,* 425 F.2d 842, 843 (2 Cir. 1970); *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 945 (2 Cir. 1969); *Cauble* v. *White* 360 F. Supp. 1021, 1029 (E.D. La. 1973). Once the offer closes, however, it is the shareholders not the offeror who should complain if they were injured by the countersolicitations of management. The Williams Act "was designed to protect cash tender offerees, not offerors." *Klaus* v. *Hi-Shear Corporation,* 528 F.2d 225, 232 (9 Cir. 1975). Their silence objectively demonstrates that they were not injured. "No violation of 14(e) could be shown where the class sought to be protected has not been harmed." *Sargent* v. *Genesco, Inc.,* 492 F.2d 750, 769 (5 Cir. 1974).

Even if we assume that the Court of Appeals was correct and that management's opinion that the tender offer was inadequate and not setting forth all the terms of the Grumman transaction constituted material misrepresentations upon which shareholders relied, the shareholders were not injured. The Piper Aircraft shareholders who refused to accept Chris-Craft's $65 tender offer were able to sell their shares for more than $65 shortly after the offer closed (R.651A) and were offered substantially more under both

the Chris-Craft and Bangor Punta exchange offers. As the District Court found, "in terms of price to tendering shareholders" Piper Aircraft management's "efforts to procure a better alternative" for shareholders were "successful" (A-136). Its opinion that the tender offer was inadequate, even assuming that the statement referred to the price, was proven to be factually correct.

A Piper Aircraft shareholder, claiming under Section 14(e) that he was misled into not tendering to Chris-Craft in January, would not have had any damages had he sued in May 1969. By May 1969 Piper Aircraft shares were selling for substantially more than $65 per share and sold for over $80 per share in August (R.652A, R.654A). Nevertheless, the Court of Appeals construed Section 14(e) to permit Chris-Craft to recover $36 million in damages against the Piper individuals even though the shareholders, the class for whose benefit the statute was enacted, could not have claimed damages from them for the January events.

Chris-Craft's action was brought three months after its tender offer closed and only after Chris-Craft found that Bangor Punta "seemed to be succeeding" (R.1340A) in its efforts to acquire control. "The purpose of the Securities Exchange Act" said the Ninth Circuit in *Royal Air Properties, Inc.* v. *Smith, supra,* 312 F.2d, at 213-214, "is to protect the innocent investor, not one who loses his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the Act."

c. The Direction to Enter Joint and Several Liability Penalizes Management and Tips the Balance of Regulation in Favor of the Offeror to the Detriment of Shareholders.

As Judge Friendly pointed out in *Electronic Specialty Co.* v. *International Controls Corp., supra,* 409 F.2d, at 945, "in contests for control the management has a role to play as such and not merely insofar as the managers

are stockholders." [Quoting from *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 695 (2 Cir. 1966)]. In *Rondeau* v. *Mosinee Paper Corp., supra*, this Court recognized that the Williams Act did not curtail that role. "Congress intended to do no more than give incumbent management an opportunity to express and explain its position" 422 U.S., at 58. Senator Williams himself stated when his bill was passed by the Senate in 1967: "S.510 is designed solely to require full and fair disclosure for the benefit of investors. The bill will at the same time provide the offeror and management equal opportunity to present their case." 113 Cong. Rec. 24664 (1967).

Under the Williams Act, the SEC was authorized by Section 14(d)(4) to prescribe rules and regulations concerning recommendations to shareholders to accept or reject the tender offer. The SEC's regulations in effect in January 1969 concerning recommendations to reject a tender offer required filing a Schedule 14D and furnishing the information required by Items 1(b) and 2(b) of Schedule 14D. Rule 14d-4, 17 C.F.R. § 240.14d-4 (1968). No claim is made that these requirements were not complied with. The pertinent information required by Items 1(b) and 2(b) were the identity of the tender offer and "the reasons for the solicitation or recommendation to security holders to accept or reject such tender offer." Rule 14d-101, 17 C.F.R. § 240.14d-101 (1968).

Hence, management clearly has a role in tender offers. Indeed, in January 1969 shareholders of many corporations were confronted with a rash of tender offers accompanied by a proliferation of letters to shareholders and litigation—by both sides—attacking and defending the tender offers.

Judge Friendly observed in *Electronic Specialty Co., supra*, 409 F.2d, at 948, tender offers are contests. "This means that the participants on both sides act, not 'in the peace of a quiet chamber,' . . . but under the stresses of the

market place. They act quickly, sometimes impulsively, often in angry response to what they consider, whether rightly or wrongly, to be low blows by the other side. Probably there will no more be a perfect tender offer than a perfect trial."•

In *Armour and Company* v. *General Host Corporation*, 296 F. Supp. 470, 475 (S.D.N.Y. 1969) Judge Weinfeld refused to enjoin an exchange offer, noting:

> "The stockholders are entitled to exercise their own judgment as to these matters. The plaintiffs' contention that the exchange offer is highly speculative and otherwise undesirable for Armour stockholders has, as noted, been extensively publicized. The Armour stockholders are aware of plaintiffs' claims of the alleged speculative nature of the securities being offered and the alleged shortcomings of the General Host proposal. The decision whether to buy, exchange, or do neither should rest with each individual stockholder."

Here the Piper Aircraft shareholders made their decision during Chris-Craft's tender offer in January. It was not until more than three months later, after Bangor Punta entered the contest and "seemed to be succeeding" (R.1340A), that Chris-Craft claimed it was injured.

There is no suggestion in the record that the Piper individuals should have foreseen in January that Bangor Punta would succeed in acquiring control of Piper Air-

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• The conduct alleged in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 966 (2 Cir. 1969), cert. denied, 399 U.S. 909 (1970), was far more reprehensible than that charged against the Piper individuals here, yet the court refused to create a federal remedy since plaintiff could sue in the state courts. Judge Timbers expressed improper concern here that denying standing to Chris-Craft would "extinguish a liability" (A-30). See also, *Armour and Company* v. *General Host Corporation*, 296 F. Supp. 470, 474 (S.D.N.Y. 1969), for another description of management's conduct during a contested takeover in January 1969.

craft seven months later after allegedly violating the 1934 Act. Nor is there any finding that the Piper individuals were aware of or participated in those alleged violations. Hence, even assuming that the January letters were violations of Section 14(e), Bangor Punta's subsequent conduct intervened and was a superseding cause of Chris-Craft's claimed injury. The Piper individuals should have been free of any liability to Chris-Craft.

This result is particularly appropriate in this case. The $36 million judgment in Chris-Craft's favor is not intended to compensate Chris-Craft for the January events. The Court of Appeals never considered, or permitted the District Court to consider, whether the January events caused compensable injury to Chris-Craft. Nor did the Court of Appeals permit the District Court to consider whether the Piper individuals should be held personally liable—it reached that determination in a footnote in its opinion (A-68, n. 31)—despite the finding by the District Court that Chris-Craft's complaint against the Piper individuals should be dismissed *"a fortiori"* because Piper Aircraft was not liable (A-161).

The Court of Appeals thus refused to consider the basic principle that even joint tortfeasors cannot be held jointly and severally liable when their acts cause distinct and separable injuries. "Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement, Second, Torts § 433A.*

Chris-Craft suggests that since the January events denied it the opportunity to purchase more shares on its

* As Dean Prosser states: "Where two or more causes combine to produce . . . *a single result, incapable of any logical division,* each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it." Prosser, Law of Torts 315-16 (4th Ed. 1971), emphasis supplied. As pointed out, of course, even if there were only a single harm, it was capable of logical division.

tender offer (but in any event not enough to give it control), Bangor Punta was able to enter the contest in May and, through its own subsequent purchases, acquire sufficient shares by September to give it control. If there were validity to this theory, at most the parties would be successive tortfeasors bringing about distinct and separate injuries. In such a case damages should be apportioned.

The Court of Appeals assumed, however, that Chris-Craft suffered only a single harm, *i.e.* a reduction in the value of its Piper Aircraft holdings when Bangor Punta acquired control. The "contribution," if any, of the Piper individuals to that harm—presumably deterring shareholders from tendering to Chris-Craft in January—is clearly distinct and logically separable.

At trial the evidence demonstrated that Chris-Craft was not seeking control of Piper Aircraft for cash on its tender offer. To the contrary, the District Court found that Chris-Craft's "commitment to seeking long term investment in and control of Piper [Aircraft] came later, under compulsion" (B-61). Indeed, the parties stipulated at trial that shares were available both during and after the tender offer for less than $65 per share. Chris-Craft did not purchase them (R.285A).*

Moreover, even if contrary to Chris-Craft's Schedule 14D it did plan to acquire control for cash on its January tender offer, it would have cost Chris-Craft 43.11% per year to borrow sufficient cash to have purchased the requisite number of shares (A-114). Thus, the record shows that Chris-Craft actually suffered no harm as a result of the January events. Nothing done by the Piper individuals thereafter harmed Chris-Craft. As Judge Mans-

* The Court of Appeals majority's explanation for why Chris-Craft did not make such purchases (A-62) was of its own creation. Judge Mansfield in his dissent referred to the explanation as a "hypothesized desire" (A-115). Not even Chris-Craft offered that excuse in the courts below.

field pointed out in his dissent, in a financial sense Chris-Craft had "shot its bolt" by early February 1969. It was "thereafter relegated in its quest for control of Piper [Aircraft] to the use of exchange offers" (A-114).

The Court of Appeals majority, however, made what Judge Mansfield called the "fanciful assumption" that the January letters "undoubtedly . . . influenced" Piper Aircraft shareholders against accepting Chris-Craft's later exchange offers "by casting a general pall of unfairness" over Chris-Craft's reputation (A-115).* This "rank speculation" could not overcome the undisputed fact that the Piper individuals did not participate in or have any knowledge of Bangor Punta's subsequent alleged violations.

The Court of Appeals' construction of Section 14(e) thus assures that persons making takeover bids have an insurance policy should they fail to get control. If management acts in the interests of all shareholders, the corporation may have to pay. How that protects investors is impossible to discern. See A-159 to A-161; see also *H.K. Porter Company, Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424-5 (1 Cir. 1973). Here, the Court of Appeals, in a footnote (A-68, n. 31), held that the Piper individuals acted only in their own interests and did not have to face the issue.** Should that ruling stand, however, in future takeovers management's first interest will have to be its own rather than those of the shareholders. The result may well be either

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* The fact that between the close of Chris-Craft's tender offer on February 3 and the opening of its exchange offer on May 19 over 2 million shares of Piper Aircraft stock traded on the New York Stock Exchange (R.651A-652A) hardly suggests that shareholders were relying on anything said by Piper Aircraft's management.

** The court never explained the basis for that finding. Since Chris-Craft had offered employment contracts to the Piper individuals and other members of management (R.2060A-2061A), it is difficult to perceive how management can ever avoid being charged with acting in their own interests if they are also shareholders.

silence or bland pronouncements with less effort made to find a better alternative for shareholders. This surely will not assure that shareholders receive adequate information upon which to base their decision when confronted with a tender offer.

The result of the Court of Appeals' decision will be to muzzle management in future takeover battles, contrary to the express intent of the Williams Act. Any member of management would be foolhardy indeed were he to resist a takeover knowing that, if the offeror is unsuccessful, he can with the benefit of hindsight find a minor misstep and recover his entire cost from management personally even if the shareholders themselves benefit from the resistance. It is no answer to say that the purpose of the Williams Act is to assure that tender offers should proceed fairly. The Piper individuals are not paying for their presumed wrongful conduct on Chris-Craft's tender offer, but for Bangor Punta's alleged violations months later.

If management is to have a role to play in tender offers, we submit that some limitations must be imposed upon an implied right of action under Section 14(e). When management in the honest exercise of its judgment believes that a takeover would not be in the interests of shareholders, it should not be penalized if the competitor they invite in violates the law without their knowledge. If, in the course of their resistance, management acts wrongfully, it should be liable to the shareholders injured by their actions. But if the shareholders benefit from the resistance, the Congressional purpose behind the Williams Act is not satisfied by penalizing management at the behest of the company losing the takeover bid.

In *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 594-5 (1973), this Court observed in connection with Section 16(b) of the 1934 Act

> "In deciding whether borderline transactions are within the reach of the statute, the courts have come

> to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent * * * thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits."

Under the Williams Act, the evil to be prevented is that shareholders may have to make uninformed decisions when confronted with a tender offer. To hold management liable in perpetuity for a misstep early in the contest does not implement that objective, it frustrates it. Future managements will hesitate to express their views and will curtail their efforts to procure a better alternative.

In this case, for example, the Court of Appeals declared that it found "no fault in the Piper family's effort to avert through a Grumman merger what they had concluded was an unfavorable takeover by [Chris-Craft]. Such a maneuver is a common response to a takeover attempt" (A-39). The District Court found that management's "efforts to procure a better alternative for Piper [Aircraft] shareholders" were made "and were, in terms of price to tendering shareholders, successful" (A-136). Nevertheless, the Piper individuals were held personally liable, jointly and severally, with Bangor Punta on the speculation that their January violations "contributed" to Bangor Punta's later success. Such a distortion of Section 14(e) is unwarranted and should be reversed.

d. The Award of Over $36 Million in Damages Violates the Requirement of Section 28(a) of the 1934 Act That Only "Actual Damages on Account of the Act Complained of" May be Recovered.

Sending the letters of January 27 and 28, which expressed the opinion of Piper Aircraft's Board that the Chris-Craft tender offer was inadequate, and issuing the press release and letter of January 29 concerning the

Grumman transaction, were the only violations of Section 14(e) by the Piper individuals which the Court of Appeals found caused harm to Chris-Craft.* That harm was the presumed denial to Chris-Craft of the "opportunity to purchase additional shares" on its tender offer (A-62). Under Section 28(a) of the 1934 Act the Piper individuals could only be liable to Chris-Craft for the "actual damages on account of the act complained of."

One need not pause long to consider why Chris-Craft never attempted to establish such damages; there were none. Chris-Craft could not have purchased significant additional shares for cash in January and would have had to pay 43.11% per annum to borrow the cash. By its own admissions, Chris-Craft could have disposed of the shares it purchased at least as late as May, without loss and possibly some profit (R.1338A-1340A; R.1556A-1557A). Hence, even if the January events were violative of Section 14(e) they did not damage Chris-Craft. On this basis alone, the decision of the Court of Appeals must be reversed.

The fifteenfold increase in damages awarded by the Court of Appeals after the remand was a complete abandonment of its original damage formulation. It was not predicated on the reduction in value of Chris-Craft's shares attributable to Bangor Punta gaining control, but rather on the difference between Chris-Craft's average cost per share and the price Chris-Craft hypothetically would have received had it sold its shares in January 1970. This revised formulation results in a reimbursement to Chris-Craft of the premium over the market which it paid before any of the alleged 14(e) violations occurred. It also results in a payment to Chris-Craft covering the decline in

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* The Piper Aircraft letters of June and July 1969 recommending in favor of Bangor Punta's exchange offer and against Chris-Craft's exchange offer were also found by the Court of Appeals to violate Section 14(e), but caused no harm to Chris-Craft (A-63).

market values occurring between January 1969 and January 1970, a period when the market took a precipitous drop.

The Court of Appeals recognized that by its award it was "shifting the entire burden of [Chris-Craft's] loss to defendants" (B-27). In so doing, the Court of Appeals rewarded Chris-Craft, which spent $44 million to acquire its shares (A-18), by giving it over $36 million in compensatory damages and the benefit of a five year injunction against Bangor Punta voting over 200,000 of its shares. Chris-Craft retains its shares, however, and can sell them at a time of its own choosing. This result does violence to the requirement of Section 28(a) that no plaintiff may recover "a total amount in excess of his actual damages."

Although the Court of Appeals affirmed the District Court's finding that Chris-Craft failed to prove it would have obtained control of Piper Aircraft, its damage formulation overcompensates Chris-Craft. For example, the court did not consider how much more Chris-Craft would have had to pay to acquire additional shares with no assurance that it would gain control. The Court did not consider how much of its damage award covers "the expected fruits of an unrealized speculation," which the First Circuit condemned as an element of damages in *Janigan* v. *Taylor*, 344 F.2d 781, 786 (1 Cir.), cert. denied, 382 U.S. 879 (1965). Nor did the court consider how much Chris-Craft would have received had it sold its shares after its tender offer and before Bangor Punta's purchases in May.

Chris-Craft did not claim any Section 14(e) violations by the Piper individuals during or at the conclusion of its cash tender offer. In fact it publicly stated that its tender offer was concluded successfully (R.282A) and its Vice President and counsel stated in a sworn affidavit executed in March 1969 that shareholders were not deterred from

tendering to Chris-Craft on its tender offer (R.1338A). It was not until Chris-Craft read published reports that Bangor Punta had purchased a large block of shares in mid-May 1969 that Chris-Craft began to believe that it might not get control (R.1340A). It was only then, on May 22, 1969, that Chris-Craft brought suit (R.1226A-1228A).

In the face of such a record, it is inconceivable how assessing damages of more than $36 million against the Piper individuals amounts to anything but the unlawful award of punitive not actual damages.*

To further compound the injustice, Chris-Craft's damages were not calculated as of January 1969, the time of the alleged Section 14(e) violations by the Piper individuals, or May 1969, the time of suit, or September 1969, when Bangor Punta achieved control, but January 1970, the time that one of Chris-Craft's witnesses thought Chris-Craft would have available a registration statement for a public offering (B-29).

In *Foster* v. *Financial Technology Inc., supra,* 517 F.2d, at 1072, the Ninth Circuit did not allow market forces to enhance damages, declaring that "damages are limited by what [plaintiffs] would have realized if they had acted upon their claim when they first learned of the fraud or had reason to know of it." In such a case, "plaintiff will not be able to avail himself of any further decrease in the value of the security after that date." *Cant* v. *A.G. Becker & Co., Inc.,* 379 F. Supp. 972, 975 (N.D. Ill. 1974). See also *Harris* v. *American Investment Company, supra,* 523 F.2d, at 228. Here, of course, Chris-Craft admittedly would have realized a profit, or at least no loss,

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* Punitive damages may not be awarded under Section 28(a). See, *Richardson* v. *MacArthur,* 451 F.2d 35, 43 (10 Cir. 1971); *Myzel* v. *Fields,* 386 F.2d 718, 748 (8 Cir. 1967), cert. denied, 390 U.S. 951 (1968); *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1286 (2 Cir. 1969), cert. denied, 397 U.S. 913 (1970).

had it competed in the market place rather than in the courts. Instead, it has had the Court of Appeals "assess many millions of dollars of damages in the form of a bail-out of Chris-Craft from its misadventure in Piper" Aircraft stock (A-160).

Conclusion

The Piper individuals acted in the interests of all shareholders when they and the other members of Piper Aircraft's Board of Directors recommended against accepting Chris-Craft's cash tender offer. They committed no violations of Section 14(e), nor was Chris-Craft injured by failing to purchase additional shares on its tender offer. The District Court after hearing all the evidence properly dismissed Chris-Craft's complaint against them. In reversing the District Court, the Court of Appeals awarded relief by discarding traditional principles and assessed punitive rather than actual damages. For these reasons the judgment of the Court of Appeals should be reversed and the judgment of the District Court dismissing the complaint against the Piper individuals should be reinstated.

Respectfully submitted,

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CHRONOLOGY OF PURCHASES OF PIPER AIRCRAFT SHARES

During the relevant time period the total number of Piper shares outstanding was 1,644,790.

DATE	EVENT
Dec. 30, 1968	Chris-Craft makes first purchase of Piper Aircraft shares or NYSE.
Jan. 21, 1969	Chris-Craft's purchases to date total 102,600 Piper Aircraft shares, or 6.2%.
Jan. 22, 1969	Chris-Craft purchases 101,100 Piper Aircraft shares from Technology Fund. Now owns 203,700 shares, or 12.4%.
Jan. 23, 1969	Chris-Craft announces cash tender offer.
Jan. 24-Feb. 2, 1969	Chris-Craft purchases an additional 38,800 Piper Aircraft shares on NYSE. Now owns 242,500, or 14.7%.
Feb. 3, 1969	Chris-Craft cash tender offer expires with 304,606 Piper Aircraft shares tendered. Now owns 547,106 Piper Aircraft shares, or 33.3%.
Feb. 27, 1969	Chris-Craft files S-1 for exchange offer.
Mar. 18-Apr. 1, 1969	Chris-Craft purchases 9,100 additional Piper Aircraft shares on NYSE. Now owns 556,206 Piper Aircraft shares, or 33.8%.
May 8, 1969	Bangor Punta agrees to purchase 501,090 shares, or 30.5%, from members of the Piper family.

Date	Event
May 14-23, 1969	Bangor Punta purchases 120,200 Piper Aircraft shares, or 7.3%. Now has 621,290 shares, or 37.8%.
May 19, 1969	Chris-Craft exchange offer effective for minimum of 80,000 shares. Only 39,286 shares were tendered and none were accepted.
July 18, 1969	Bangor Punta exchange offer effective.
July 24, 1969	Chris-Craft second exchange offer for up to 300,000 shares, with no minimum, effective.
July 29, 1969	Bangor Punta exchange offer expires with 110,802 shares, or 6.7%, tendered. Now owns 732,092 shares, or 44.5%.
Aug. 4, 1969	Chris-Craft second exchange offer expires with 112,089 Piper Aircraft shares tendered. Now owns 668,295 shares, or 40.6%.
Aug. 7, 1969	Bangor Punta shareholders approve exchange offer.
Aug. 8, 1969	Bangor Punta begins open market purchases of Piper Aircraft shares.
Aug. 12, 1969	Chris-Craft resumes open market purchases of Piper Aircraft shares.
Aug. 18, 1969	Chris-Craft ceases its purchases of Piper Aircraft shares after acquiring 29,200 additional shares, now owning 697,495 shares, or 42.4%.
Sept. 5, 1969	Bangor Punta acquires an additional 100,614 shares through open market purchases and owns 832,706 shares, or 50.6%.

(b) Piper Family

CCI's charges against the Piper family stem from a series of communications to Piper shareholders in the form of shareholder letters and a press release.

The shareholder letters dated Januury 27 and 28, sent while the CCI tender offer was pending, stated that the Piper Board of Directors had "carefully studied this offer and is convinced that it is inadequate and not in the best interests of Piper's shareholders". It further stated that, if CCI were suddenly willing to offer shareholders $65, it must believe that Piper stock is worth more than it is offering.[15] CCI contends that a reasonable shareholder

15 The letter also stated that Piper was talking to major industrial corporations about combination and that if one could be put through, "[A] higher value could be realized for all shareholders." This was not misleading because Piper officials were trying to find an alternative, such as a merger, that would be better for themselves and Piper shareholders. The letter also urged shareholders to consider "important points" such as the facts that "Piper's sales increased more than 20% in fiscal 1968 over the prior year, and its earnings per share were approximately 29% higher." CCI maintains that they should also have disclosed that sales and earnings for the first quarter of the next fiscal year were down considerably compared to the first quarter of the previous year. We cannot say that, once Piper mentioned sales and earnings figures, it was required to reveal all relevant figures. Nor can we say that the decline was so severe that it made the previous year sales and earnings figures deceptive.

would have assumed that "inadequate" referred to price. At that time Piper stock was selling on the market for considerably less than $65 per share. First Boston in fact had given Piper its opinion that the price offered was "fair and equitable". The Piper corporation itself, acting through the Piper family, at that time was contemplating a large sale of Piper stock to Grumman at the same price.

The district court concluded that "inadequate" referred to factors other than price, such as the quality of Chris-Craft management. We disagree. A reasonable shareholder reading the letter most likely would assume that the reference was to price. Since price usually is what a person contemplating a sale of shares is most concerned with, a prudent shareholder naturally would assume that the Piper family was addressing itself to that consideration in opposing the offer. If the Piper family intended to refer to other factors, it surely would have been more specific. The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. See *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7 Cir. 1969). By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control. Corporate insiders therefore have a special responsibility to be meticulous and precise in their representations to shareholders. The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading.

CCI also attacks the press release of January 29 by Piper officials that Grumman had "agreed to purchase" 300,000 shares of Piper at $65 per share. CCI argues that the tentative nature of the January 25 agreement was not adequately disclosed in the release. The agreement permitted Grumman to return the entire 300,000 shares for a refund of its purchase price plus interest within six months. This "put" provision was not disclosed in the press release, although it was described in Piper's application for listing with the NYSE. The release did reveal that the agreement was subject to the approval of the Piper and Grumman boards as well as other conditions. The published list of conditions gave the appearance of being exclusive, thus solidifying the impression that the sale was all but formally completed.

We find no fault in the Piper family's effort to avert through a Grumman merger what they had concluded was an unfavorable takeover by CCI. Such a maneuver is a common response to a takeover attempt. See Schmultz & Kelly, *Cash Take-Over Bids—Defense Tactics*, 23 Bus. Law 115, 132-34 (1967). We also agree with the district court's conclusions that the agreement was not a "sham" and that the "put" was a rational and logical part of the agreement. But Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e). By failing to disclose this provision, the release portrayed the Grumman agreement as a completed, favorable deal between Piper and Grumman which also was likely to provide a basis for further and more profitable relations between the two companies.[16] The "agreement" actually was

16 This depiction of the agreement was further suggested by a statement in the release that the "purchase provides an opportunity for Grumman and Piper to study the feasibility and advantages of a possible combination of the two companies."

a preliminary and conditional overture directed toward a possible merger. The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer.

CCI also challenges the shareholder letters with respect to the BPC and CCI exchange offers on the ground that they failed to disclose the Piper family's financial interest in the success of the BPC general exchange offer. Letters dated June 4 and July 25 urged Piper shareholders to accept the BPC exchange offer. A June 20 letter disparaged the CCI exchange offer. All the letters were sent over the signature of W. T. Piper, Jr. None of the letters explained that, under the terms of the May 8 agreement between BPC and the Piper family, the Piper family might profit handsomely from BPC's acquiring a controlling interest in Piper.[17] The agreement provided, as stated above, that, if the value of the securities package traded to the Piper family for their Piper holdings was below $80 per Piper share on the effective date of the general exchange offer, BPC would make up the difference, *if* BPC were successful in obtaining over 50% of the outstanding Piper shares. The Piper family therefore potentially had an interest in the success of the BPC exchange offer. By July 25, they must have realized that this interest amounted to a considerable sum of money.[18] If the letters merely had sup-

17 The preliminary and final prospectus for the BPC general exchange offer disclosed that there had been an exchange offer made to the Piper family and related that under the May 8 agreement the family might gain from the success of the general exchange offer. We do not believe under the circumstances that disclosure in a detailed and extremely complex prospectus, which did not accompany the letters, fulfilled the Piper family's duty to reveal this material fact. Cf. *Mills* v. *Electric Auto-Lite Co.*, 403 F.2d 429, 433 (7 Cir. 1968), *vacated and remanded*, 396 U.S. 375 (1970).

18 One estimate placed the amount at a total of $13 million.

plemented the prospectus in providing publicity for the terms of the offer, there might be less basis for concern that the Piper family's self-interest was not disclosed. But the letters are replete with the personal opinions and recommendations of W. T. Piper, Jr. on the quality of the BPC securities and the management of BPC. The July 25 letter, sent after the Piper family must have known what they stood to gain in the event of a successful BPC takeover, stated that "we strongly recommend" the offer and "we have been impressed with the management and operations of Bangor Punta". Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family. Cf. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 197-201 (1963).

We hold that the communications to Piper shareholders in the form of shareholder letters and a press release constituted violations of §14(e) by the Piper family defendants.

The Piper family's violations also caused injury to CCI. Piper contends that since CCI was not able and willing to accept any more shares than it did accept as a result of the cash tender offer, the January letters to shareholders and the Grumman press release were harmless. The evidence does not support this contention.

Since CCI had decided by the time of the cash tender offer that its objective was to win control of Piper, it clearly was willing to accept as many shares as it could obtain. While it was ready to commit itself to purchase only 300,000 shares, that limitation does not indicate that it would not accept a substantial number of additional shares if tendered.[27] Indeed, it expressly reserved the right to purchase more than the 300,000 shares.[27a] And although Piper offered some evidence indicating that CCI might have trouble

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27 Mr. Gordon testified, when asked why CCI had committed itself to purchase no more than 300,000 shares, that one reason was that "[w]e did not want . . . Piper to emphasize the fact that the financing for the shares beyond 300,000 had not yet been arranged—to emphasize that successfully, because we knew we could arrange it, but we didn't have it at that time."

27a Officers of CCI announced to the press that the tender offer was successful. The Piper family would have us construe this announcement as a concession that CCI did not expect or desire more from its cash tender offer. As is well known, such statements in this context often are made for the sake of appearance. We decline to ascribe to them the interpretation suggested by the Piper family.

financing additional purchases, it appears that such financing was available. Mr. Gordon testified that, before the cash tender offer had expired, he had arranged with Burnham & Co. to borrow up to $22,000,000 if needed to purchase shares in excess of 300,000. Moreover, the fact that CCI bought only a few shares of Piper on the market after the termination of its cash tender offer is of little probative value. There are many possible explanations for this consistent with CCI's position that it would have purchased additional shares pursuant to the cash tender offer. For example, CCI might have been avoiding the expense of searching out small blocks of shares and the high transactional costs involved in purchasing them. We are satisfied that CCI had a desire to purchase, and was capable of purchasing, a substantial number of additional shares pursuant to its tender offer.

The January letters to shareholders and the Grumman press release misled the Piper shareholders into believing that CCI's tender offer was undesirable. CCI's tender offer could be fruitful only if Piper shareholders believed that the price was currently a fair one and would remain so for at least a reasonable period in the future. The fairness of the offer is demonstrated by the fact that, despite the misrepresentations of the Piper family, over 300,000 shares were tendered. Considering the soundness of the offer and the materiality of the Piper family's deceptions, it is a reasonable presumption that CCI was unlawfully denied the opportunity to purchase additional shares. See *Crane Co.* v. *Westinghouse Air Brake Co., supra,* 419 F.2d at 797. Moreover, these misleading statements most likely had a continuing adverse effect on CCI's attempts to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's exchange offer, many undoubtedly remembered and were influenced by the Piper

family's misleading January statements portraying CCI as a company that made inadequate and unfair offers.

We hold that, considering the narrow margin of victory here, the Piper family's misstatements and omissions in the January shareholder letters and the Grumman press release denied to CCI a fair opportunity to win the contest for control.

The June and July letters to Piper shareholders are a different matter. Although they omitted any reference to the arrangement between the Piper family and BPC whereby the family might gain a considerable amount of money if BPC were to be successful in gaining control of Piper, CCI protected itself against injury from such omission by sending letters to all Piper shareholders on June 16 exposing this non-disclosure by the Piper family. The nature of the Piper family's personal stake in the exchange offer was fully described. We therefore conclude that this omission was rendered harmless.

We hold that the record establishes that the injuries sustained by CCI were caused by the violations of the securities laws by BPC and its named officers, First Boston and its named officers and members of the Piper family.

(1) *Damages*

Piper has come under the dominance of BPC, with many of its management positions being assumed by BPC officers. It has been operated that way for two or three years. Divestiture of the ill-gotten shares would not be appropriate under the circumstances of this case because it would be difficult to administer and would unnecessarily reopen the control battle. CCI understandably no longer desires to take control of a company that has been substantially changed. It seeks damages.

We have held that the unlawful conduct of the Piper family,[31] of BPC and its named officers, and of First Boston

31 The Piper Aircraft Corporation itself was not a perpetrator of th violations of the securities laws. The evidence shows that members o the Piper family acted not on behalf of the corporation in committing their illegal acts, but in their own individual interests. The district court correctly characterized Piper as "the prize in the battle, not a contender". 337 F.Supp. at 1146. We agree that no liability is to be imposed on the Piper Aircraft Corporation.

and its named officers has caused financial loss to CCI for which it should be compensated. The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time. Since the conduct of each of the defendants, through their violations of the securities laws, contributed to the success of BPC's takeover attempt, a judgment should be entered assessing damages against all defendants jointly and severally. See Section 18(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78r(b) (1970).

[Mansfield, C.J., Concurring and Dissenting Opinion]

The Piper Family Defendants

I concur in the conclusion that the Piper family defendants did not become liable to CCI by virtue of their participation in the May 8th press release announcing the BPC exchange offer. The statement of predicted value contained

in the release was not a material representation since the specific terms were contained in the registration statement filed shortly thereafter and the actual value of the package appeared as soon as the exchange offer became effective. I therefore find it unnecessary to decide whether a reasonable investor would have construed the $80 promised value to refer to market price of the security or to an appraisal of BPC's assets and earnings, or whether the archetypical investor should have been expected to make this differentiation from the bare words of the press release.

I also concur in the majority view that CCI has not proved its claim based upon the letters sent by the Piper family to Piper shareholders in June and July, 1969. Although these letters failed to mention the arrangement with BPC whereby the Piper family might gain a huge profit if BPC succeeded in acquiring control of the Piper Company, CCI promptly furnished the essential information to all Piper stockholders on June 16, 1969, before the BPC tender offer became effective. In view of the latter communication no reasonable investor would have accepted BPC's tender offer, which went into effect on July 18, 1969, in reliance upon the Piper family letters.

I must dissent, however, from the majority's failure to accord similar treatment to the claim based on the earlier letters written by the Piper family to Piper stockholders on January 27 and 28, 1969, and to the January 29 press release. I agree that these letters and press release were materially misleading and that a reasonable investor would have considered them important in deciding whether to accept or reject CCI's cash tender offer. Under the *Mills-Ute* test positive proof of reliance was unnecessary to establish causation. However, proof of damages is a separate question and requires more. As the Supreme Court stated in *Mills* v. *Electric Auto-Lite, supra* at 388-89:

> "On the other hand, where, as here, the misleading aspect of the solicitation did not relate to terms of the merger, monetary relief might be afforded to the shareholders only if the merger resulted in a reduction of the earnings or earnings potential of their holdings. In short, *damages should be recoverable only to the extent that they can be shown.*" (Emphasis supplied)

Applying this principle, CCI must show that it suffered some resulting loss. This it has failed to do. In making the January cash tender offer it agreed to purchase up to 300,000 Piper shares if tendered by February 3, 1969, and the district court found that it was not seeking more. 304,606 shares were tendered and purchased by CCI. Thus CCI exceeded its goal. It got more shares than it agreed to buy. No loss was suffered. Indeed it publicly stated that the cash tender offer had been a success.

Although CCI reserved the right to purchase more than 300,000 shares, it did not have sufficient funds to purchase any significant amount in excess of 300,000. Nor had "financing for . . . shares in excess of 300,000 . . . been arranged. . . ." (Testimony of C. Leonard Gordon, CCI's Vice-President and General Counsel). It is true that Mr. Gordon testified that Burnham & Co. would have provided additional financing if more than 300,000 shares had been tendered. However, the record shows conclusively that CCI's chances of obtaining such a loan were negligible, due to a restrictive agreement in effect with its senior noteholders and the prohibitive cost of borrowing additional funds.

Under its agreement with its senior noteholders CCI had obligated itself not to have any unsecured current debt for bank loans in excess of a $15,000,000 revolving line of credit already obtained from the Philadelphia National Bank. The parties have stipulated that on February 3, 1969, the entire proceeds of this $15 million loan were re-

ceived by CCI and used by it to pay for Piper shares received by it on its January 24, 1969, cash tender offer, which closed on the same date the loan proceeds were received. (App. 825A). By February 4, 1969, CCI had purchased 540,000 shares of Piper stock at a cost in excess of $30,000,000. Its cash resources were virtually exhausted. Yet it did not seek waivers from its senior noteholders to permit additional borrowing. Indeed, the parties have further stipulated that no resolution authorizing CCI to borrow money or obtain credit from any other source to purchase Piper stock was ever sought or adopted. (App. 284A).

The reason for CCI's failure to seek additional loans was made clear by testimony of Mr. Woudhuysen, a partner of Burnham & Co., that the borrowing terms would have involved an 8¾% interest rate plus the issuance of 22,500 CCI warrants, exercisable at the market price of CCI common stock, for each million dollars borrowed on a two-year loan. Thus if CCI should borrow $20 million on such a two-year loan the total cost of the money, calculated according to a commonly accepted formula, would have been a staggering 43.11%!

In summary, having "shot its bolt" in the financial sense by early February 1969 CCI was thereafter relegated in its quest for control of Piper to the use of exchange offers. It was in no position to purchase for cash any appreciable amount of Piper shares over and above the 304,606 tendered in response to its initial cash offer. Indeed, although additional Piper shares were available in the market after the expiration date of CCI's tender offer, some at less than $65 per share,[3] CCI purchased only 9,100 shares between

3 The Piper family January letters and press release regarding the Grumman transaction did not cause an increase in the market price of Piper shares. On the contrary the price declined from 64¼ per share on January 28 to 59⅝ on February 3.

February 3, 1969, and April 7, 1969, when the SEC advised it that such cash purchases during the pendency of its exchange offer (for which it had filed its Form S-1 with the Commission on February 27, 1969, to become effective May 15, 1969) would violate Rule 10b-6. The record further reveals that although Herbert Siegel, Chairman of the Board of CCI, knew as early as February, 1969, that Cornfeld's Fund of Funds Proprietary Fund, Inc. owned a large block of 78,600 Piper shares (later purchased by BPC), CCI made no effort to purchase it. Nor can CCI's lack of pursuit of the substantial Cornfeld block be attributed to a hypothesized desire to avoid the expense of searching out and purchasing small blocks of shares, as the main opinion suggests.

By March 19, 1969, when the Grumman deal collapsed, any possible effect of the Piper family's January 29, 1969, Grumman press release was completely dissipated, and by April 7, 1969, when the SEC took the position that further cash purchases were prohibited by Rule 10b-6, CCI could no longer claim that the January letters inhibited its purchase of Piper shares. By May 8, 1969, when BPC announced its tender package valued at $80, CCI could no longer contend that the Piper family's statement that Piper shares were worth more than $65 per share was misleading. Nor is the main opinion's fanciful assumption that the January letters "undoubtedly . . . influenced" Piper shareholders against accepting CCI's later *exchange* offer by casting a general pall of unfairness over CCI's reputation anything more than rank speculation.

Dogged by its inability to obtain financing that would have enabled it to purchase available Piper stock for cash in competition with BPC, CCI's efforts to obtain control by the cash offer route were doomed to failure. By the close of its second exchange offer on August 4, 1969, CCI owned 41% of Piper's outstanding shares as compared with

45% owned by BPC. Thereafter it was BPC's cash purchases in the open market of 100,614 shares, as compared with CCI's capacity to buy only 29,200 shares, that won control for BPC.

Thus there has been a complete failure to show that the Piper family's January letters and press release, which form the sole basis for the majority's decision holding liable the Piper family defendants, caused any damage to CCI. The record is clear that the Piper communications, unlike the misleading statements in BPC's exchange offer or BPC's cash purchases in violation of Rule 10b-6, did not deprive CCI of a fair opportunity to compete in the contest for control or enable BPC to win that contest.

In short, since the record shows that CCI did not suffer any damages as a result of the Piper family's communications, I would affirm the dismissal of CCI's claim against the members of that family.

1. Piper's shareholder letter and release of January 23, 1969.

(a) One of the attacks on these communications centers on the utterance by the Piper management of its view that the $65 Chris-Craft offer was inadequate. While the offer was some $13 above the current market price, it was considerably less than a Piper holder, biding his time, could have received at later stages of the contest.

Chris-Craft insists that the communications could not be read to refer to any inadequacy of the Chris-Craft offer other than in respect to price and—to establish Piper's bad faith and intention to mislead—it points out that

(1) Piper's own bankers had advised Piper that $65 per share was a fair price and

(2) the Grumman agreement contemplated a sale of Piper stock by Piper to Grumman at $65 per share.[6]

Any Piper shareholder with a telephone or a newspaper at hand could compare the current market for Piper shares with Chris-Craft's offer. Thus, if the Piper statement of the inadequacy of the offer were intended to refer to price only it would be more fatuous than misleading. The more rational view is that the statement referred and was or should be taken to refer to other factors—such as Piper's

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[6] We do not doubt that one of the reasons for the Grumman agreement was the effect its consummation would have on the number of shares outstanding and consequently on the number Chris-Craft would have to acquire to gain control. W. T. Piper, Jr. had no hesitancy in stating that the Grumman transaction "would give us additional shares" and that it "might make the . . . tender offer of Chris-Craft less attractive to our shareholders." A psychological effect may have been intended as well—to discourage Chris-Craft early in the game by facing it with the prospect of a heavier than anticipated commitment to the contest. As noted above, the shares were never issued.

management's views as to company prospects or as to the quality of Chris-Craft management, should Chris-Craft acquire control.

That Piper's management refrained in these releases from expressing fully its personal (and in all likelihood unflattering) opinions about Chris-Craft's management does not, in our opinion, fault the communications. And if the statements were intended to convey the impression that to resist Chris-Craft Piper's management would bend its efforts to procure a better alternative for Piper shareholders, the efforts were made and were, in terms of price to tendering shareholders, successful.

Chris-Craft makes the further assertion that it was itself, as a purchaser, misled by the announcement of the Grumman agreement. Chris-Craft claims that an indication that Grumman was willing to pay $65 (in the absence of disclosure of the "put"—see n. 2 supra) helped to justify its own decision to pay that much, indicated that Chris-Craft might have a willing buyer for its block, should it decide to unload, and led Chris-Craft to refrain from exercising its right to withdraw its offer if any material increase in outstanding Piper shares were proposed or made.

While the Court has no doubt that the Grumman agreement, the announcement and their timing were strategic moves, it cannot conclude that the agreement was a sham, or that the "put" provision was anything more than what Piper purports it to be—Grumman's "out" in the event that a Grumman-Piper merger did not materialize. These were all, under the circumstances, rational steps for the Piper and Grumman managements to take and the Court cannot hold that in taking its steps Piper had any special duty to warn Chris-Craft (by disclosing the "put" or otherwise) not to gather comfort from the agreement price of $65 and not to rely on Grumman as a possible dumping ground for its shares of Piper.

Chris-Craft admits that Piper described the "put" aspects of the Grumman agreement fully in its application to the New York Stock Exchange for listing of the additional shares. Chris-Craft's contention therefore that, despite its efforts to obtain a copy of the Grumman agreement, it did not learn of it until April, 1969 when two Chris-Craft representatives were elected to the Board is not worthy of belief and can evoke little more than the additional response that it could have been more sedulous than it was to protect its already heavy and growing investment in Piper.

But the fatal blow to Chris-Craft's credibility on this issue is its action after April, 1969 when it claims first to have discovered the "put" provisions of the Grumman agreement. Between April 1 and August 18, Chris-Craft acquired about 150,000 additional shares of Piper. On May 16 it added $10 to its exchange package to compete with Bangor Punta. Such behavior with knowledge of the facts is inconsistent with a claim that knowledge would have caused Chris-Craft to change its course. Plaintiff's reference to *SEC* v. *Great American Industries*, 407 F.2d 453 (2d Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) (nondisclosure of finders' fees) is, under the circumstances, beside the mark.

(b) Chris-Craft has further criticized the communications for saying that Piper was in a growth industry and expected "to participate fully in this growth". The basis of its attack is in product problems faced by Piper in connection with a model then in development (Pocono) and one already on the market (Twin Comanche). These are discussed at greater length, *infra*. Here it is sufficient to point out that inherent in Chris-Craft's claim are the assumptions (1), that these problems would effectively prevent Piper from participating in the industry's growth—which it has not proved and (2), that this on-the-run re-

sponse of Piper's management to Chris-Craft's foray into the Piper stock is to be tested by the standards applicable to a registration statement—a view which this Court rejects.

Chris-Craft's contentions as to the January Piper communications and the Grumman agreement must be and are rejected as unfounded.

Certificate of Service

I hereby certify that three copies of the foregoing Brief for Petitioners were served by hand this 9th day of June on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: June 9, 1976

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